No. 391.

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

VS.

H. W. BAKER,
Defendant in Error.

Error to the United States Circuit Court for the District of Washington, Northern Division.

Points and Authorities for Plaintiff in Error.

GEO. H. FEARONS,
I. D. McCUTCHEON,
R. B. CARPENTER,
Attorneys for Plaintiff in Error.

GEO SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

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POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action brought by H. W. Baker against the Western Union Telegraph Company in the Circuit Court of the United States for the District of Washington, Northern Division, for damages for delay in the delivery of a message sent by B. Singer & Company from Sydney, Australia, to H. W. Baker & Company, Seattle, Washington. The damage alleged to have been sustained was in consequence of the loss of the sale of a cargo of lumber shipped by the defendant in error to B. F. Singer & Co. at Sydney. The case was tried before Hon. C. H. Hanford, District Judge, sitting as a Circuit Judge, and a jury. Verdict for plaintiff, $3,215.60. Motion for new trial duly made on the grounds stated in the

Record, at page 23, and denied. The defendant brings the case here by writ of error to reverse the judgment and direct the Circuit Court to grant a new trial. The errors alleged are set out on pages 169 to 180, inclusive.

Assignment of Errors and Argument.

The questions of law in this case arise upon the charge of the Court to the jury set out in the assignment of errors, on the pages aforesaid, and errors of law occurring at the trial. We rely upon each of the errors so specified, but will make the following specifications as a portion of the errors relied on in the case.

I.

The Court erred in charging the jury that "the plaintiff in this case seeks to recover damages for an injury "alleged to have been suffered by him in consequence "of a wrong committed by the defendant. The action "belongs to the class of actions that are known by lawyers as actions *ex delicto*, or actions arising from torts, "that is, from wrongs committed." (Record, pp. 132–3).

It is respectfully submitted that this is not an action in tort, but an action on the contract set out in the Record, page 191.

"Where there is an undertaking without a contract, "there is a duty incident to the undertaking, and if it is "broken there is a tort, and nothing else. The rule "that, if there is a specific contract, the more general "duty is superceded by it, does not prevent the general "duty from being relied on where there is no contract "at all."

Webb's Pollock on Torts, p. 653.

The same learned author further says: "Now that the "forms of pleading are generally abolished or greatly "simplified, it seems better to say that wherever there "is a contract to do something, the obligation of the con- "tract is the only obligation between the parties with re- "gard to the performance, and any action for failure or "negligence therein is an action on the contract; and "this whether there was a duty antecedent to the con- "tract or not." (*Id.*, p. 654.)

Primrose vs. *W. U. T. Co.*, 154 U. S., p. 1.
McAndrew vs. *Elec. Tel. Co.*, 17 Q. B., 3.
Playford vs. *United Kingdom Elec. Tel. Co.*, L. R. 42, p. 706.

As it is evident that there was a contract for the transmission of this message from Penzance, England, to Washington, the obligation of the company in regard to its performance must be determined by the provisions of that contract.

Aside from this universal principle of law, the complaint itself clearly indicates that the action is upon the contract. Paragraph VII of said complaint is as follows:

"That the said telegram was duly sent over the said "defendant's wires, the said defendant receiving the said "telegram as the carrier of telegrams and messages for "value received, and the said defendant was duly paid "and did receive and accept due pay and consideration "for the prompt and correct transmission of the said "telegram from the said B. Singer to the said H. W. "Baker & Co., and did, both by its relations to the pub- "lic and its public capacity as a public corporation, *and*

" *its contract from the said B. Singer and the said H. W.*
" *Baker & Co. at the time of the receipt of the said tele-*
" *gram, contract and agree and promise to correctly, faith-*
" *fully, accurately, diligently, and carefully, and with*
" *promptness receive, transmit and deliver the said tele-*
" *gram from said B. Singer to the said H. W. Baker*
" *& Co.*" (Record, pp. 9–10.)

If this is not an allegation of a contract between the plaintiff and the defendant, it would be difficult to know what language could be used to constitute such a contract.

That such a contract is valid and binding upon the parties thereto is fully and conclusively settled by the Supreme Court of the United States in the case of *Primrose* vs. *The Western Union Telegraph Company, supra.*

In the last cited case, Mr. Justice Gray, who delivered the opinion of the Court, said: " The conclusion is irre-
" sistible that if there was negligence on the part of the
" defendant's servants, a jury would not have been war-
" ranted in finding that it was more than ordinary negli-
" gence; and that, upon principle and authority the mis-
" take was one for which the plaintiff, not having had the
" message repeated according to the terms printed upon
" the back thereof, and forming part of his contract with
" the company, could not recover more than the sum
" which he had paid for sending the single message "
(p. 27).

The same learned justice further said: " Beyond this,
" under any contract to transmit a message by telegraph,
" as under any other contract, the damages for a breach
" must be limited to those which may be fairly considered
" as arising, according to the usual course of things, from

" the breach of the very contract in question, or which " both parties must reasonably have understood and con- " templated, when making the contract, as likely to result " from its breach. This was directly adjudged in *West-* " *ern Union Telegraph Co.* vs. *Hall*, 124 U. S., 444."

According to these authorities, if the plaintiff had any right of recovery that right rested solely on the provisions and conditions of the contract.

It would be equally illogical and unreasonable where parties have made a contract to perform a certain thing that one of them should have the right to bring another and different action independent of and outside the contract.

It is immaterial in what form the contract comes before this Court, if it is in the record, if the proofs shows its execution and delivery and the defendant acted upon it, that is enough.

II.

We submit that the learned Judge erred in charging the jury that " A telegraph company engaged in the " business of transmitting intelligence for pecuniary " compensation is charged with the duty of exercising a " high degree of care as to promptness, accuracy, and " good faith in transmitting the message from the sender " to the one to whom it is addressed; and any neglect to " exercise the requisite degree of care in any of these " particulars which results in any injury, gives a right of " action and entitles the injured person to have the loss " that has been sustained made good or the injury com- " pensated." (Record, p. 133.)

A great number of cases from different States might be cited to show that this "high degree of care" is not required of a telegraph company when the message is sent upon one of its blanks; that only ordinary care is requisite, and that the company cannot be held liable except in cases of wilful misconduct or gross negligence. It is unnecessary, however, to cite other authorities, for that of *Primrose* vs. *Western Union Telegraph supra* is exactly in point.

The English cases are to the same effect.

MacAndrew vs. *Elec. Tel. Co., supra.*

Playford vs. *United Kingdom Elec. Tel. Co., supra.*

III.

We respectfully submit that the Court erred in charging the jury that "When in an action of this kind it is "shown by competent evidence that a telegram has been "delivered to a telegraph or cable company for trans- "mission and that an error has been committed in its "transmission, resulting in damage, and suit is brought "against the company which last received and delivered "the message, the law presumes that the responsibility "for such error rests with that company, unless it can "show that all of its operators and agents and employees "who were concerned in transmitting the message were "free from negligence." (Record, pp. 135–6.)

The first objection to this instruction is that it assumes such a state of facts to be shown by competent testimony, and upon that assumption assumes a presumption of law, whereas all that could be said properly upon the subject was that evidence had been introduced tending to prove

such a state of things, and from that evidence no presumption of law whatever would arise. From the fact that there was testimony to show that the message was written at Sydney and placed upon the wires at Sydney, to Baker, there is no presumption of law that in its transmission to Penzance—during which there were fifteen relays of the message (Record, p. 118); that is, that the message was taken off one wire and passed on another wire and line fifteen times—that the word Baker continued to be on the wire and was so delivered at Penzance. There is no presumption of law about it. It is solely a matter of testimony. The law does not presume upon which line the mistake was made, the first or last, hence the necessity of testimony to fix the responsibility upon the defendant.

But the error of the instruction does not stop here, because there was direct and positive proof at the trial of the contents of the message received by the company at Penzance and transmitted to Washington. That testimony should have been left to the jury with the other testimony in the case, but it was excluded from the jury, practically, by the Court.

Assuming the Court to have been right in regard to the presumption, the presumption would cease when testimony was introduced that disproved it.

Lawson on Presumptive Evidence, p. 576.

The deposition of George R. Mockridge, superintendent of the company at Penzance, taken at Penzance, was read in this case, and in answer to the following question the deponent said:

"Q. If you answer the sixth interrogatory in the "affirmative, you may state what person or telegraph "company delivered said message to the defendant for "such transmission."

"A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission."

"Q. If you answer the last interrogatory that it was the Eastern Telegraph Company, you may state if you know whether that company operated a telegraph company between Sydney and Penzance."

"A. The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance." (Rec., p. 80.)

"Q. If you have the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it, and cause it to be annexed to your deposition, and marked 'Exhibit A.'"

"A. I produce the said original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and it is annexed to this deposition and marked 'Exhibit A.'" (Rec., pp. 81–2.)

The telegram was then received in evidence and marked "Defendant's Exhibit A," attached to the deposition of G. R. Mockridge, and reads as follows:

"Defendant's Exhibit A. Western Union Telegraph

" Company, lessees of The American Telegraph & Cable " Company. Penzance Station. From Sydney Station " to Barker, Seattle.

"Offered four pounds thousand cif. advise accept " market dull, no outlet." (Rec., p. 82.)

Not only does this witness positively identify and swear to this exhibit as the original message forwarded by the company from Penzance to Seattle, but he negatives the idea of the reception of any other message at that time of a similar character.

" Q. 12. Was any message received by the Western Union Telegraph Company, on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to 'Baker,' Seattle, and reading 'Offered four pounds thousand cif advise accept market dull no outlet?'"

" A. No."

" Q. 13. State whether, on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company, from Penzance to New York, and, if so, on what day the same was transmitted?"

" A. The message referred to in the sixth interrogatory, addressed 'Barker, Seattle,' was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891." (Rec., p. 83.)

On cross-examination, in answer to Q. 2, the same witness said:

" A. I do not say that a message came over the wire addressed 'Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no out-

let.' I did not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to 'Barker, Seattle,' did say: 'Offered four pounds thousand.' It did not say 'offered fourteen pounds thousand.' I am sure that the message was 'Barker, Seattle, offered four pounds thousand cif, advise accept, market dull, no outlet,' and not Baker, Seattle offered four pounds thousand and not 'fourteen pounds.' I am so sure because I have seen and have now before me the original message itself."

"Q. Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message, did you transmit it from your office—that is, the Western Union Telegraph Comyany's office—for which you are acting, 'Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet?'"

"A. We did transmit the message as it was received. I admit that we did transmit the message. The message was transmitted from the Western Union Telegraph Company's office for which I am acting, as follows: 'Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet.'" (Rec., pp. 84–5.)

The same witness in answer to Q. 5 said:

"A. The said original message is not known as eleven, but is known as number seven, *and is the message I received.* There has been no change made in it since it was received. I do not say that I have sent the original message out of the office and attached it to this interro-

gatory. By the original message I mean the message as received at our office at Penzance, and not the message as written by the sender at Sydney. I sent the original message by the authority of the London representative of the Western Union Telegraph Company. The said London representative told us to do it. It is not true that I made a copy of it and attached a copy instead of sending the original message; the original message itself was sent. (Rec., p. 87.)

In answer to the sixth cross-interrogatory, the same witness said:

"A. I have not destroyed the original message received in this case. It is not true that we have a rule in our office to destroy these original messages every six months from the date they are received. It is not true that this message, with all other messages, was destroyed in pursuance to any rule. This one message was kept in the usual way with the other messages. It is not true that the message attached is not the original message, *as the original message is the one attached hereto;* it has not been destroyed. The message attached has not been prepared." (Rec., p. 88.)

Counsel for Baker objected to the introductory question leading to the foregoing questions and answers "on "the ground that the witness is not competent to answer "unless the question is clearly intended for the purpose "of showing that the files of the office showed a telegram "on file addressed in the manner indicated by the ques- "tion." (Rec., p. 78.)

This is the whole scope of the objection, and the answers prove conclusively that Defendant's Exhibit A was

not only on file in the office, but was the telegram received from the Eastern Telegraph Company, and the only one received from that company of that character and transmitted to Seattle.

Edward Chambers, manager of the Penzance office of the Western Union Telegraph Company, testified in his deposition, *without objection*, in answer to question six:

"A. The Western Union Telegraph Company received at Penzance from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, addressed to 'Barker.' (Rec., p. 92.)

In answer to question seven, the same witness said:

"A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission." (Rec., p. 93.)

The witness further said:

"Q. If you have the original message, delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked 'Exhibit A.'"

"A. I have not the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, but it is now produced to me, marked 'Exhibit A,' and annexed to the deposition of George Robert Mockridge, made herein this day."

"Q. Was any message received by the Western

Union Telegraph Company on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to 'Baker, Seattle,' and reading, 'Offered four pounds thousand cif 'advise accept market dull no outlet?'

"A. No message was received by the Western Union Telegraph Company on October 1st, 1891, at Penzance from Sydney, Australia, addressed to 'Baker, Seattle,' and reading, 'Offered four pounds thousand cif advise 'accept market dull no outlet.'" (Rec., p. 94.)

"Q. State whether on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company, from Penzance to New York, and if so, on what day the same was so transmitted."

"A. The message referred to in the sixth interrogatory, addressed 'Barker, Seattle,' was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891." (Rec., p. 95.)

"Q. Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked 'Exhibit A,' addressed either to 'Barker' or 'Baker?'"

"A. No." (Rec., pp. 95–6.)

In answer to the second cross-interrogatory the witness said:

"A. I do not say that a message came over the wires addressed 'Baker, Seattle Washington, offered four 'pounds thousand cif advise accept market dull no out-'let.' I did not receive such message. No one received

such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received, addressed to 'Bar-'ker, Seattle,' did say 'offered four pounds thousand.' It did not say 'offered fourteen pounds thousand.' I am sure that the message was 'Barker, Seattle, offered four 'pounds thousand cif advise accept market dull no out-'let,' and not 'Baker, Seattle, offered four pounds thou-'sand' and not 'fourteen pounds.' I am so sure because I have seen and have now before me the original message itself, being Exhibit A, above referred to. By the words 'original message' I mean the message as received by our company at Penzance." (Rec., p. 97.)

In answer to question five, the witness said:

"A. The message called 'original message,' marked 'Exhibit A,' and annexed to the deposition of the said George Robert Mockridge, is not known as 'eleven,' but as number 'seven,' and is the message received. There has been no change in it since it was received. I did not send the original message out of the office. The said George Robert Mockridge did—and attached it to his interrogatory. The original message is attached to the deposition, and not a copy thereof." (Rec., p. 99.)

If the language of these witnesses is not testimony to the effect that Defendant's Exhibit A is the original message received from the Eastern Telegraph Company and transmitted to Seattle, then human language fails to express such testimony. It could not be stronger or more direct. And with this testimony before the Court and jury, the Court instructed the jury that "the law presumes

" that the responsibility for such error rests with that " company."

IV.

The Court erred in the following instruction:

" The Court directs your attention to the testimony " given by the depositions of Michael J. O'Leary and " G. R. Mockridge and Edward Chambers, and instructs " you that neither one of the said witnesses are shown to " be competent to testify as to the manner in which the " telegraphic message in question was transmitted over " the wire between any points or received at any point " on its route. These witnesses do testify to facts which " are proper to be considered in this case bearing on the " question as to whether the message was properly re- " ceived, or properly delivered, I should say, to this com- " pany.

" They show what was on file at the different offices, at " Penzance and New York, but the point of this in- " struction is that they are not good witnesses to prove " the condition in which the message came to the office " at Penzance; they are giving, not the best evidence, " but secondary evidence. They can only testify as to " what some other person has placed in the records in " their office, or has said about the matter; and the law " requires that the witnesses who made those reports to " these witnesses should give his testimony under oath " the same as other witnesses in order to make it of the " same character and degree of credibility and reliability " as the other testimony in the case. Because they are " repeating to us here unsworn testimony is why I in- " struct you their testimony is not good to prove the fact

" in the case as to the condition of the message when " transmitted from Porthcurno to Penzance.

" So far as the contents and address of the said mes- " sage are concerned, the legal effect of the testimony of " the two witnesses residing in Penzance is only that the " message as recorded in the Penzance office was as " shown by the copy attached to said deposition, and the " same is true as to the witness O'Leary, the legal effect " of his testimony upon that subject being only that the " message on file in the office in New York was as shown " by the copy annexed to his deposition." (Rec., p. 137.)

It appears that the Court in the instruction last above quoted to the jury indulged in other presumptions in no way warranted by the Record. Why are not the witnesses competent? They are presumed to be competent witnesses unless the contrary is shown; and if incompetent, they would not be allowed to testify. They are competent upon the ground of the objection made by Baker in the Court below, because they do prove what was on file in the office at Penzance, and they prove more: that the same paper that was on file in the office at Penzance was the original message received from the Eastern Telegraph Company.

The instruction is also erroneous in stating that all the testimony of Mockridge and Chambers shows, was that this telegram (Defendant's Exhibit A) was on file in the office at Penzance. The positive testimony of both shows, to be sure, that it was on file as the original telegram should be, and it shows also that the identical message on file was the original received from the Eastern Telegraph

Company. They are not giving secondary evidence. They both testify to their positive knowledge of the facts. There is no proof in this case that any other person had anything to do with the reception of this message from the Eastern Telegraph Company. There is no testimony that any other person had anything to do with transmitting it. To enable the Court to charge the jury as it did upon this subject the Court must indulge in the legal presumption that nobody but an active operator could know the contents of a message received from another telegraph office; and, further, that no one except a professional operator, actively engaged in that business at the time, could receive or send a message by telegraph; whereas, as a matter of fact, superintendents and managers understand telegraphic signals as well as operators, because they have been operators, and can receive or send messages as well as active operators, and often do it.

Whether we are right in this position or not, the testimony of Mockridge and Chambers is positive—one that he received the message and transmitted it to New York, and the other that he knew of its being received; knew that it was the original message, and knew that it was transmitted to New York.

Now, to say that this is hearsay, is to contradict flatly the testimony. It is not hearsay; it is direct, positive evidence that the Court had no right to reject, and which should have been submitted to the jury instead of being taken practically from them by the decision of the Court that the witnesses were not competent to prove the facts that they had positively sworn to.

V.

The Court erred in charging the jury "if you find "that there is a fair preponderance of the evidence "proving or tending to prove that there was a mistake "in the address of the message and that the message as "received by the defendant at Seattle was addressed in "a different way than when it was sent from Sydney, "and by reason of this error there was a mis-delivery of "the message and delay in delivering it to the plaintiff, "and that by reason of that delay the plaintiff lost an "opportunity to sell the cargo of lumber referred to in "said message to a customer who was ready to buy and "pay for it, and that by losing that opportunity of sale "he made a loss on the cargo by reason of the decline in "the market, and that the defendant has not shown by "competent evidence that the error was not committed "by the defendant or any of its servants or employees, "then your verdict should be for the plaintiff for the "amount of his loss, if you find all of these facts from the "evidence." (Rec., pp. 137–8.)

There are two errors in this instruction. First, the law requires the plaintiff in an action on a contract with a telegraph company, the same as in any action on a contract, to prove his case. If, instead of receiving this message from the Eastern Telegraph Company at Penzance, it had been deposited by an individual, would not the law require proof that the individual deposited the message, and of its contents, and the error committed in its transmission?

Under the contract in this case, the Eastern Telegraph

Company is simply an agent of the sender of the message to deposit the telegram with this company, and the precise telegram deposited should be proved as in any other case.

But the error does not end here. As before stated, the defendant had proved the contents of the message deposited at Penzance by two witnesses, positively. The instruction ignores this testimony entirely. And there can be no doubt of the intention of the Court to ignore it in consequence of previous and subsequent rulings that it was incompetent for all purposes except to prove that the message was on file at Penzance as sent to Seattle.

VI.

The Court erred in giving the following instruction to the jury:

"In determining whether the defendant company has "been negligent, it is your duty to give consideration to "all the facts that are proven, both as to the conduct of "the defendant and its employees and representatives "and all of the other actors in this transaction; Mr. "Baker's failure to register a cable address by which he "expected to receive messages before this transaction is "one of the circumstances which you are to take into "account because if he had done that it might have "avoided this error. I do not say that it would and I "am not saying that you should find that it did, but it is "one of the circumstances that a fair man would take "into account and give consideration to before he would "come to an ultimate decision on the point of whether "the telegraph company was negligent or not." (Rec., pp. 138–9.)

The Court should have instructed the jury that Baker's failure to register a cable address by which he expected to receive messages before the transaction referred to was negligence, and that he could not recover if the jury believed he had neglected to register such an address.

This was the first cable message that Baker & Co. had ever received by the Western Union Telegraph Company from Sydney or elsewhere, so far as the testimony shows. Baker in his sworn complaint states that after the shipment of said lumber he notified B. Singer at Sydney by telegram by the defendant's lines, but in his testimony he admits that he did not send that or any other message over the defendant's wires (Rec., pp. 43–44), and that he had no cable address registered with the defendant (Rec., p. 75).

Was it reasonable to expect a company to know anything about the cable address "Baker" when he had registered no address, had sent no previous message over its line, and in no way given it notice that he was expecting any cablegram at any time?

The Court below from its instructions seemed to be under the impression that the similarity between the names of Baker and Barker tended to produce the mistake. This is an entire error, because in cable addresses the name is purely arbitrary and signifies nothing except a designation of something that may be entirely different in sound and orthography. The rules and regulations of the company authorize the registration of a name that represents the name of a firm and its full address. This is simply to save money to the patrons of the com-

pany, who would otherwise be required to pay for the full name and the full address.

That the plaintiff was familiar with this rule of the company is evident from his testimony where he explains that "Ritual" is "B. Singer & Company," that is that it was the cable address of B. Singer & Company, registered in Sydney, and where he further states "That it "is customary that a concern has a registered cable ad- "dress; if they have a long name, they will have it "registered—it saves expense," and where the plaintiff further swears that he had no cable address with the defendant in Seattle. (Rec., p. 75.)

The registration is without fee, and solely to save money to the patrons of the company. Under such circumstances, it was negligence in the plaintiff to neglect to register such an address because the word "Baker" as a cable address signified nothing to the company unless some firm or person was registered as "Baker," and there being no such registry, it was simply meaningless. If it had been sent "Baker" it was still meaningless to the company, but it was not. And "Barker" was equally so, except that the employees of the company knew a man of that name, of large means, connected with the bank, delivered it to him, and they thought, and honestly thought, it properly delivered.

VII.

The Court devotes some space as to the legibility of the message as delivered, and then says:

"The testimony does not show what the condition of "the writing was any further than there is testimony of

" a witness that the message he sent was directed to " Baker, and there is a copy of a dispatch introduced in " evidence which bears upon it an endorsement that " would be legal evidence of an admission against the " telegraph company that received it for transmission " (that is, the Eastern Telegraph Company)—an admis- " sion that that was received addressed to Baker, and " there is an absence of testimony tending to prove that " the writing delivered in Sydney was not legibly writ- " ten."

The Court erred in charging the jury: "Now, from " all that, a presumption naturally arises that the message " was started right; that Mr. Baker's agent in Sydney or " his correspondent there delivered a message addressed " to Baker, and not one that might have been mistaken " as being addressed to Barker, but the evidence is en- " tirely silent as to whether the error occurred in the " office of transmittal—there is nothing to show that it " occurred there, so that this question of the legibility of " the writing can have but very little effect in aiding you " in arriving at a decision." (Rec., pp. 139, 140.)

It is submitted that there is nothing in the facts recited in this instruction that created any presumption whatever that the message was started right. There is testimony tending to show that it was started right, but there is no presumption whatever; and when the Court says that the evidence is entirely silent as to whether the error occurred in the office of transmittal (meaning at Sydney), it should have said that there is evidence tending to prove that it did occur somewhere on the line before reaching Penzance, because it reached Penzance "Barker" and not

"Baker," and that testimony should have been left to the jury instead of being withdrawn from it, or so qualified as to be equivalent to its withdrawal.

VIII.

The Court erred in charging the jury:

"If this message had come to the Seattle office addressed "to Abraham Barker and it had been delivered at Mr. "Barker's place of business or his residence to a mature "and prudent person—an adult, prudent person there, "according to the usual custom of business, it would be "hard to blame the company for negligence in so deliv- "ering it, but a message simply directed to Barker, unless "there was some previous understanding between Mr. "Barker and the telegraph company by his having "registered that address in the company's office, accord- "ing to their rules for registering, would not give them "the right to send that message and drop it down on his "desk or leave it in the hands of some other person "without some inquiry as to whether he was the proper "Barker that was entitled to receive it." (Rec., p. 140.)

It is submitted that the evidence shows that Abraham Barker was the only person in the judgment of the employees of the company for whom the message could be intended, and therefore it was precisely the same as though it had been addressed to Abraham Barker. And it is submitted that the message was not dropped down upon Mr. Barker's desk, that the evidence shows that it was receipted for by the president of the bank, and the agents of the company were not informed that Mr. Barker was out of town, and they did expect (as the

Court says they had a right to expect) that the message had been properly delivered, and as soon as they learned the contrary from the Eastern Telegraph Company at Sydney they delivered the message to Mr. Baker.

It is somewhat peculiar that the Court in these instructions assumes that the company ought to have done for Mr. Baker precisely what it says it ought not to have done for Mr. Barker, and this when the testimony in the case fully shows that there were large numbers of firms engaged in shipping lumber to Australia at Seattle. Assuming that the message discloses (which it is submitted it does not) the nature of the transaction, it still might apply to many persons besides Baker, and yet these instructions throughout charge the company with the duty of hunting up Baker and delivering the message to him without any guide whatever.

IX.

It is submitted that the Court erred in charging the jury:

"If the error was on the part of the operator who re-
"ceived the message in the Penzance office, then it
"would be negligence for which this defendant and
"company is liable." (Rec., p. 142.)

This instruction is faulty in two particulars. First, as the company under the contract is only liable for wilful or gross negligence, it would not be liable for a mistake on the part of the operator at Penzance; and, second, there is no evidence, not the slightest, that any error was committed on the part of the operator who received the message in the Penzance office, and there is positive tes-

timony that the message was received from the Eastern Telegraph Company precisely as it was transmitted to Seattle.

X.

The Court charged the jury:

"A party doing business with a telegraph company, "and who is receiving messages under an abbreviated or "assumed name owes it to the telegraph company that "he advise it that he is so doing and that he expects "messages so addressed, in order that no mistake may be "made by such telegraph company in the delivery of "such message.

"The telegraph company is bound to deliver messages "as they are addressed, and have no right to disclose the "contents of any message to any person other than the "one addressed. If the defendant received the message "in question addressed to 'Barker,' then when it had "reached its destination it had no right to disclose the "contents to any person of the name of 'Baker,' so long "as it was not informed that the message was intended "for 'Baker' and not for 'Barker.'"

"It is the duty of any person sending a telegram to "another to make the address so plain as that the tele-"graph company may in the exercise of ordinary care "and diligence, deliver the same without the necessity "of making inquiry." (Rec., p. 142.)

This is good law, but the other instructions heretofore quoted, and others in the record, directly contradict it. If a party doing business under an abbreviated or assumed name owes it to the telegraph company that he advise it that he is so doing business and that he expects

messages so addressed, in order that no mistake may be made in the delivery of the message, then, if he does not so advise it, it would follow as a matter of law and common sense that the company would not be responsible for not delivering such messages.

But the general scope of the instructions in this case is that while the party owes that to the telegraph company, it makes no difference whether he performs his obligation or not. He may be negligent, he may neglect to give the company any means by which it can deliver messages, he may utterly ignore the company's rights, and yet the company is bound to make the losses caused by his negligence good to him.

XI.

The Court charged the jury:

"The defendant is not bound to show how or where "the mistake occurred. If it shows that it did not occur "on its line or by its employees, that is sufficient, and it "is not required to go further and show how or where it "did occur." (Rec., pp. 142, 143.)

It is submitted that the defendant did show at the trial by the depositions of Mockridge and Chambers, conclusively, that the mistake did not occur on the line of the defendant, and that testimony should have been left to the jury without the qualifications attached to it by the Court.

XII.

The Court charged the jury: "The burden is not on "the plaintiff to prove where the error occurred in order "to have a right to recover from the defendant. The

" defendant is obliged to prove that the error did not " occur in any of its offices, but it is not obliged to go " further than that and prove where the error was com- " mitted." (Rec., p. 143.)

We insist that the burden of proof was on the plaintiff to prove that the error occurred on the lines of the defendant, not the precise point, but somewhere on the lines; and we insist further that the defendant did prove that the error did not occur in any of its offices, or on its lines.

XIII.

The Court charged the jury: " I want the jury to un- " derstand by what I have said that the testimony of the " witnesses who have given their depositions here, Mr. " Chambers and Mr. Mockridge, is the best evidence ob- " tainable, as to what the files in the office at Penzance " show was received as the message, and it is competent " for that purpose, as I have said, that it is competent to " be considered as bearing on the question, but it is not " the best evidence as to how the message was transmitted " from Prothcurno." (Rec., pp. 146–7.)

This record was kept in the ordinary transaction of business. The witnesses were superintendent and manager of the defendant, and taking their testimony as to the reception and transmission of the message and their general connection with the business of the office generally and at the time of the reception of this message, the testimony would be competent as tending to establish the fact of the precise message received and transmitted.

Chateaugay Ore & I. Co. vs. *Blake*, 144 U. S., 476.

Seventh Day Advent. Pub. Assn. vs. *Fischer*, 54 N. W. Rep., 759.

Montague vs. *Dugan*, 68 Mich., 100.

Ganther vs. *James Jenks & Co.*, 43 N. W. Rep., 601.

Mo. Pac. Ry. Co. vs. *Gernon et al.*, 19 S. W. Rep., 461.

The witnesses testified positively. There is nothing in this record tending to show that they testified from other than their personal knowledge or from hearsay. There can be no mistake about their statements, because they are contained in depositions; and having testified positively, and nothing appearing in the record to show that they were testifying from hearsay, the Court is bound to receive their statements as evidence.

Atlanta Glass Co. vs. *Noizet*, 13 S. E. Rep., 833.

In this case the Court said: "Taking the whole of the "witness' testimony given as it appears in this record, it "would seem that he was testifying of his own knowl- "edge. However that may be, it does not appear to us "affirmatively that he was testifying from hearsay; and, "unless it should so appear, we could not hold that the "Court erred in allowing the testimony."

XIV.

The Court erred in permitting the witness Baker to testify as to conversations with Brown, the manager of the company at Seattle, against the objection of the defendant, for the reason that the company could not be bound by the admissions or statements of its employees

as to the reception or delivery of the message or non-delivery, after the event. (Rec., p. 37.)

XV.

The Court erred in admitting the statements of the witness Baker in regard to the declarations and statements of O'Leary in New York, made long subsequent to the first of October, 1891, the said O'Leary's declarations and statements being in no way binding upon the telegraph company as to what occurred after the first of October, 1891, the date when the message was sent. (Rec., p. 38).

XVI.

The Court erred in refusing to give the instruction requested by plaintiff in error "that there is nothing on "the face of this telegram which would indicate to a "person not acquainted with the transaction that it re-"fers to a sale of lumber, or that it was intended to be "delivered to the plaintiff in this action. In cases where "a telegram is so written that its contents convey no "meaning to the agents of the telegraph company into "whose hands it may come for transmission and delivery, "so that its importance may be fully understood, the "sender takes the risk of the proper transmission and "delivery of the message, and the company would be "liable for but nominal damages for any error which might "occur after it came into its hands." (Rec., p. 177.)

There was nothing on the face of this message that would indicate to a person not conversant with the business and parties that any special damage would arise from its non-delivery. Nor is there anything on the face of

the message that indicates in any degree or to any extent for whom the message was intended.

In an action founded upon a contract, only such damages can be recovered as are the natural and proximate consequence of its breach, or such as the law supposes the parties to it would have apprehended as following upon its violation, if at the time they made it they had bestowed proper attention upon the subject and had full knowledge of all the facts.

Sutherland on Damages, 2d Ed., 92, and cases cited.

Wood's Mayne on Damages, p. 67, and cases there cited.

In *Western Union Telegraph Co.* vs. *Hall*, 124 U. S. Rep., 444, it was held: The damages to be recovered in an action against a telegraph company for negligent delay in transmitting a message respecting a contract for the purchase or sale of property are, by analogy, with the settled rules and actions between the parties to such contracts, only such as the parties must or would have contemplated in making the contract, and such as naturally flow from the breach of its performance, and are ordinarily measured by actual losses based upon changes in the market value of the property.

In *Candee* vs. *Western Union Telegraph Co.*, 34 Wis., 471, it was held that "The measure of damages for a breach "of such a contract is the loss which may be fairly "considered as naturally arising from such breach, or "which may reasonably be supposed to have been in "contemplation of both parties when they made the con- "tract as the probable result of the breach thereof."

In the case of *Hadley* vs. *Baxendale*, 9th Exch., 345 (a leading case on both sides of the Atlantic, approved and followed by the Supreme Court of the United States in *Western Union Telegraph Co.* vs. *Hall, supra*, and in *Howard* vs. *Stillwell Co.*, 139 U. S., 199, and in *Primrose* vs. *Western Union Telegraph Co.*, 154 U. S., p. 1), the Court held:

"Where two parties have made a contract which one of "them has broken, the damages which the other party "ought to receive in respect of such breach of contract, "should be such as may fairly and reasonably be con- "sidered either arising naturally, i. e., according to the "usual course of things, from such breach of the con- "tract itself, or such as may reasonably be supposed to "have been in contemplation of both parties at the time "they made the contract as the probable result of the "breach of it."

In that case the plaintiffs, who were the owners of a mill, sent a broken iron shaft to the office of the defendants, who were common carriers, to be conveyed by them, and the defendants' clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry if necessary must be made to hasten its delivery; and the delivery of the broken shaft to the consignee to whom it had been sent by the plaintiffs as a pattern by which to make a new shaft, was delayed for an unreasonable time, in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have had it, and they were, consequently, unable to work their mill from want of their new shaft, and

thereby incurred loss of profits. Held: that under the circumstances such loss could not be recovered in an action against the defendants as common carriers.

In the light of these authorities there is nothing in the telegram that gave to the defendant notice of any special damage that would be caused by its non-delivery. Nor was there anything that indicated in any way to whom the dispatch was to be delivered. It was apparently a cable address. The company in Seattle had no cable address of that character, and therefore the word "Baker" could have conveyed to them no information as to the person entitled to receive it, even if that word had been transmitted. When to this is added that it was transmitted "Barker," the defendant could certainly have received no intimation of the proper place of delivering the message.

The Court below was of opinion, apparently, that the message was very plain, yet it is observable that the plaintiff was at the trouble of proving not only the words of the message, but what the message meant translated into plain language, and who the message was intended for in Seattle.

The message as sent from Sydney was as follows:

"Baker, Seattle. Offered four pounds thousand cif "advise accept market dull no outlet." (Rec., p. 63.) There was no signature to the message. A portion of the message was unquestionably cipher, and no person not acquainted with the business would have had any information whatever as to the peculiar terms of this message or would have supposed that any special damage would be occasioned by its non-delivery.

There is no pretense in this case that there was any understanding between the agent of Baker & Co. and the defendant as to the importance of the message, or any explanation whatever of its contents other than appeared upon the face of it.

It was thought by the plaintiff necessary to translate or explain the message to the Court and jury so that they would understand it.

In the deposition of Hamburger the following question and answer is contained:

"Q. If you say it was addressed 'Baker, Seattle, offered four pounds thousand cif advise accept market dull no outlet, Singer,' please state what such telegram or cablegram meant. Did you get any answer to such telegram or cablegram, or any member of your firm? If you say you did get any answer, state when it was and what was the answer.

"A. The cablegram was meant to convey that we had received an offer of four pounds per thousand feet cost, insurance and freight paid by consignor, and advising Baker & Co. to accept, as the market was dull and there was no sale for lumber." (Rec., p. 63.)

If it was necessary to translate and explain this dispatch to the Court and jury to enable them to comprehend its terms and understand its meaning, why was it not equally necessary to explain its terms, its meaning to the agents of the telegraph company, if the company was to be held responsible for its non-delivery or erroneous delivery?

If the company is liable at all it is upon the face of this message, because there is not a scintilla of testimony

tending to show that any explanation was made to any of the agents of the company as to the real importance of the dispatch, nor was any explanation made to the company of what person or firm the message was intended for.

XVII.

The loss in this case was occasioned by the negligence of the plaintiff himself in causing a telegram to be sent to H. W. Baker & Co. so many thousand miles and through so many relays, addressed only to "Baker," he having no cable address filed in the defendant's office at Seattle.

It is not contributory negligence because there is no evidence that the company was negligent at all. The loss was in consequence of the negligence of the plaintiff and attributable to no other cause, and, of course, if this is the case, he cannot recover.

If the plaintiff's own negligence was an immediate and principal cause of the injury, without which it probably would not have occurred, it is certain he cannot recover damages.

2 Parsons on Contracts, 7th ed., 817.
I. & C. R. R. Co. vs. *Rutherford*, 29 Ind., 82.
Todd vs. *Old Colony R. R. Co.*, 3 Allen, 18.
Transportation Co. vs. *Dower*, 11 Wall., 129.
R. R. Co. vs. *Jones*, 95 U. S., 442.

In the last case cited Mr. Justice Swayne, speaking for the whole Court, said: "Negligence is the failure to do "what a reasonable and prudent person would ordinarily "have done under the circumstances of the situation, or do-

"ing what such a person, under the existing circumstances, "would not have done. The essence of the fault may "lie in omission or commission. The duty is dictated "and measured by the exigencies of the occasion. One "who by his negligence has brought an injury upon "himself cannot recover damages for it. Such is the "rule of the civil and common law. The plaintiff in "such cases is entitled to no relief."

Measured by this rule, what was the plain duty of the plaintiff? He had shipped lumber to Sydney, he had contracted with his agent there to keep him advised by telegraph of the reception, prices and sale of the lumber, and other matters connected with the business. He failed utterly to register any address with the company at Seattle; took no step whatever to advise the company or any of its agents that he had made such shipment or was expecting such information, and then, by his direction, presumably, because Singer & Co. were but his agents, had the message sent to what was apparently a cable address.

This was an omission to do what a reasonable and prudent person would ordinarily have done, and was negligence.

Under the circumstances and testimony in this case, the Court erred in not giving the instruction asked for by the plaintiff in error "that there is nothing on the "face of this telegram which would indicate to a person "not acquainted with the transaction that it refers to a "sale of lumber, or that it was intended to be delivered "to the plaintiff in this action" (Rec., p. 155); and also erred in refusing to give the instruction asked for by the

plaintiff in error as follows: "The jury is instructed that "from all the evidence in this case the defendant does "not appear to have been guilty of negligence either in "the receipt, transmission or delivery of the message "which it received, and therefore your verdict must be "for the defendant." (Rec., p. 157.)

XVIII.

The contract in this case was made at Penzance, England, to be executed partly in Great Britain and partly in the United States. It is foreign and interstate commerce, and in no way a local question or subject to local laws or decisions, but is a question of general commercial law to which the United States Courts apply the Federal rather than State decisions.

The Supreme Court of the United States has repeatedly held that the question of the validity of contracts limiting the liabilities of common carriers is not a local question, and by a parity of reasoning the same rule applies to telegraph companies in the transmission of international messages.

B. & O. R. R. Co. vs. *Baugh*, 140 U. S., 101.
Merrick vs. *Michigan Central R. R. Co.*, 107 U. S., 102.
Welton vs. *State of Missouri*, 91 U. S., 275.
Hall vs. *De Cuir*, 95 U. S., 485.
County of Mobile vs. *Kimball*, 102 U. S., 691.
Primrose vs. *Western Union Telegraph Co.*, *supra*.
Covington Bridge Co. vs. *Kentucky*, 154 U. S., 204.

We have not noticed all the exceptions taken to the

ruling of the Court during the progress of the trial, nor all of the exceptions taken to the charge of the Court. We have noticed enough, in our judgment, to determine this case and to determine it according to our contention, and we submit that the cause should be reversed, and the case remanded to the Circuit Court with instructions to dismiss the complaint.

Respectfully submitted,

GEORGE H. FEARONS,
I. D. McCUTCHEON,
R. B. CARPENTER,
Attorneys for Plaintiff in Error.